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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

CENTER FOR BIOLOGICAL DIVERSITY, a  
non-profit corporation, NATURAL RESOURCES  
DEFENSE COUNCIL, a non-profit corporation,  
and GREENPEACE, INC., a non-profit  
corporation;

Plaintiffs,

v.

GALE NORTON, United States Secretary of the  
Interior and UNITED STATES FISH AND  
WILDLIFE SERVICE;

Defendants.

CASE NO.:

05

5191

EMC

COMPLAINT FOR DECLARATORY  
JUDGMENT AND INJUNCTIVE RELIEF

COMPLAINT

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COMPLAINT

1 **I. INTRODUCTION**

2 1. In this civil action for declaratory and injunctive relief, Plaintiffs CENTER FOR  
3 BIOLOGICAL DIVERSITY, NATURAL RESOURCES DEFENSE COUNCIL, AND  
4 GREENPEACE, INC. challenge the failure of Defendants GALE NORTON, United States Secretary of  
5 the Interior and the UNITED STATES FISH AND WILDLIFE SERVICE (collectively “the  
6 Secretary”) to comply with the non-discretionary listing provisions of the Endangered Species Act, as  
7 amended, 16 U.S.C. §§ 1531-1544 (“ESA”). The Secretary has failed to take any action on Plaintiffs’  
8 petition to list the polar bear (*Ursus maritimus*) as a threatened species under the ESA. 16 U.S.C. §  
9 1533(b)(3)(A) and (B). Plaintiffs request this Court to order the Secretary to comply by a date certain  
10 with the ESA’s mandatory, non-discretionary “90-day finding deadline” for processing citizen petitions  
11 to list species. Id. Compliance with this mandatory deadline is necessary to ensure the continued  
12 survival of polar bears in the wild.

13 2. The polar bear is the apical predator of the arctic and is the largest of the four currently  
14 recognized species of bear in the genus *Ursus*. Polar bears live only in areas of the Arctic where there  
15 is sea ice for a substantial portion of the year and are completely dependent upon sea ice habitat for  
16 their survival. Indeed, the polar bear’s dependence on sea ice is so complete that, like whales and seals,  
17 they are classified as a marine mammal by scientists and the federal government. Polar bears utilize  
18 arctic sea ice for all of their essential behaviors, including mating, traveling, and hunting and feeding  
19 upon ringed seals, their primary prey. Some polar bears even give birth to their cubs in snow dens on  
20 top of the drifting sea ice. Yet the arctic sea ice habitat that the polar bear depends on is fast  
21 disappearing, threatening polar bears with extinction.

22 3. The disappearance of arctic sea ice is caused by global warming, which has resulted in  
23 an increase in average winter temperatures in the Arctic. Average winter temperatures in some areas of  
24 the Arctic have already risen by 7° Fahrenheit. Global warming is, in turn, caused by society’s  
25 emissions of greenhouse gases. Even using moderate projections of future greenhouse gas emissions  
26 levels, average winter temperatures are projected to rise by 18° Fahrenheit over the Arctic oceans by  
27 the end of this century.

28 4. Polar bears are threatened by other factors as well, including but not limited to high

1 levels of organochloride and other pollution in the Arctic, proliferating oil and gas development in their  
2 habitat, and overhunting in some areas in Russia, Canada, and Greenland.

3 5. On this basis, Plaintiffs submitted the 154-page Petition to List the Polar Bear (*Ursus*  
4 *maritimus*) as a Threatened Species under the Endangered Species Act (“Petition”) to the Secretary  
5 pursuant to Section 4 of the ESA. The Secretary received the Petition on February 17, 2005. Within  
6 90 days of receipt of the Petition, the ESA required the Secretary to determine, to the maximum extent  
7 practicable, whether the Petition presented substantial information indicating that listing “may be  
8 warranted,” and if so, to initiate a status review of the species. 15 U.S.C. § 1533(b)(3)(A). If the  
9 Secretary makes a positive 90-day finding, the ESA requires her to determine, within twelve months of  
10 the Petition being filed, whether the requested action (here, listing the polar bear) is “warranted” and, if  
11 so, to publish a proposed rule listing the polar bear. 15 U.S.C. § 1533(b)(3)(B).

12 6. The Secretary has abrogated her mandatory statutory duty under the ESA to issue a 90-  
13 day finding on the Petition. The Secretary has now been in possession of the Petition for *ten months*  
14 and has not issued the 90-day Finding, making compliance with the 12-month finding impossible as  
15 well. Polar bears will not receive the protections they desperately need and deserve under the ESA  
16 until the Secretary makes all of the required findings and completes the listing process.

17 7. Because the Secretary has had the Petition for nearly one year and has still failed to act,  
18 Plaintiffs now seek judicial relief declaring that the Secretary has violated the ESA and the  
19 Administrative Procedures Act (“APA”), 5 U.S.C. § 706 *et seq.*, by failing to process the Petition and  
20 issue the required 90-day finding. Plaintiffs also ask the Court to order the Secretary to make the  
21 required finding on the Petition by a date certain.

## 22 **II. JURISDICTION, VENUE, and INTRADISTRICT ASSIGNMENT**

23 8. The Court has jurisdiction over this action pursuant to 16 U.S.C. §§ 1540(c) & (g)  
24 (action arising under the ESA and citizen suit provision), 28 U.S.C. § 1331 (federal question), 5 U.S.C.  
25 § 702 (APA), and 28 U.S.C. § 1361 (Mandamus). The relief sought is authorized by 28 U.S.C. §§ 2201  
26 (declaratory judgment) and 28 U.S.C. § 2202 (injunctive relief).

27 9. Venue is proper in the Northern District of California pursuant to 16 U.S.C. §  
28 1540(g)(3)(A) and 28 U.S.C. § 1391(e) as this civil action is brought against an agency of the United

1 States and officers and employees of the United States acting in their official capacities and under the  
2 color of legal authority, as at least one Plaintiff is incorporated in this judicial district, all plaintiffs  
3 maintain offices in this judicial district, and as no real property is involved in this action.

4 10. Pursuant to Local Rules 3-5(a) and 3-2(c) and (d), assignment of this case to the San  
5 Francisco or Oakland Division is appropriate because Plaintiffs reside in San Francisco County.

6 11. By written notice sent by Federal Express overnight delivery on October 11, 2005 and  
7 received by the Secretary and the Director of the U.S. Fish and Wildlife Service on October 12, 2005,  
8 Plaintiffs informed the Secretary of her violations more than sixty days prior to the filing of this  
9 Complaint, as required by the ESA. 16 U.S.C. § 1540(g). Despite receipt of Plaintiffs' notice letter,  
10 the Secretary has failed to remedy her violations of the ESA.

11 12. An actual, justiciable controversy exists between the parties within the meaning of 28  
12 U.S.C. § 2201. Upon information and belief, Defendants claim that, their failure to issue a 90-day  
13 finding in response to the Petition complies with all applicable laws and regulations.

14 13. Plaintiffs have no adequate remedy at law. The Secretary's continuing failure to  
15 respond to the Petition will result in irreparable harm to the polar bear, to Plaintiffs and Plaintiffs'  
16 members and constituents, and to the public. No monetary damages or other legal remedy can  
17 adequately compensate Plaintiffs, their members and constituents, or the public, for this harm.

18 14. Plaintiffs and their members and constituents are adversely affected or aggrieved by  
19 federal agency action and are entitled to judicial review of such action within the meaning of the ESA  
20 and the APA. The Secretary's failure to respond to the Petition prevents the completion of the listing  
21 process and therefore the implementation of measures to protect polar bears pursuant to the ESA.  
22 Without the substantial protections of the ESA, polar bears are more likely to continue to decline and  
23 become extinct. Plaintiffs are therefore injured because their use and enjoyment of polar bears  
24 described below is threatened by the decline and likely extinction of the bears. The Secretary's failure  
25 to respond to the Petition has also resulted in informational and procedural injury to Plaintiffs, because  
26 Plaintiffs have been deprived of a timely opportunity to submit additional information and otherwise  
27 participate in the listing process in order to secure protective measures for the species. These are  
28

1 actual, concrete injuries to Plaintiffs, caused by the Secretary's failure to comply with the ESA, the  
2 APA, and their implementing regulations. The relief requested will fully redress those injuries.

3 15. The federal government has waived sovereign immunity in this action pursuant to 16  
4 U.S.C. § 1540(g) and 5 U.S.C. § 702.

### 5 **III. PARTIES**

6 16. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY ("the Center") is a non-profit  
7 501(c)(3) corporation with offices in San Francisco, Joshua Tree, and San Diego, California; Phoenix  
8 and Tucson, Arizona; Pinos Altos, New Mexico; Portland, Oregon; and Washington, D.C. The Center  
9 is actively involved in species and habitat protection issues throughout the western United States,  
10 including protection of Arctic wildlife in general and the polar bear in particular. The Center has over  
11 15,000 members throughout the United States and the world.

12 17. Plaintiff GREENPEACE, INC. ("Greenpeace") is a California non-profit corporation  
13 with offices in San Francisco, Anchorage and Sitka, Alaska, and Washington, D.C. Greenpeace is a  
14 non-violent environmental organization. Its mission is to raise public awareness of environmental  
15 problems and promote changes that are essential to a green and peaceful future. There are  
16 approximately 250,000 current Greenpeace members in the United States. Since the 1980's Greenpeace  
17 has been a lead advocacy organization working to raise awareness of global warming and the protection  
18 of wildlife, and to advocate for serious cuts in greenhouse gas emissions through local, national and  
19 global action. For the past decade, Greenpeace has campaigned on the causes and impacts of climate  
20 change in the Arctic, including the impacts on polar bears and other species who are threatened by  
21 continued Arctic warming.

22 18. Plaintiff NATURAL RESOURCES DEFENSE COUNCIL, Inc. ("NRDC") is a national  
23 environmental advocacy group. The NRDC is registered to do business in California and maintains  
24 offices in San Francisco, Los Angeles, Washington, D.C., and New York City. Through advocacy,  
25 education, litigation, and other efforts, NRDC works to preserve threatened and endangered wildlife  
26 across the United States and around the world, including Arctic wildlife in general and the polar bear in  
27 particular. The NRDC has over 550,000 members nationwide, over 100,000 of whom reside in the  
28 State of California.

1           19. Plaintiffs' members and staff include individuals with varying interests in polar bears  
2 and their habitat ranging from scientific, professional, and educational to recreational, aesthetic, moral,  
3 and spiritual interests. Further, Plaintiffs members and staff enjoy, on an on-going basis, the biological,  
4 scientific, research, education, conservation, recreational and aesthetic values of the Arctic region  
5 inhabited by this species. Plaintiffs' staff and members observe and study polar bears and their habitat,  
6 and derive professional, scientific, educational, recreational, aesthetic, inspirational, and other benefits  
7 from these activities and have an interest in preserving the possibility of such activities in the future.  
8 An integral aspect of the Plaintiffs' members' use and enjoyment of polar bears is the expectation and  
9 knowledge that the species is in its native habitat. For this reason, the Center's use and enjoyment of  
10 polar bears is entirely dependent on the continued existence of healthy, sustainable populations in the  
11 wild. Plaintiffs bring this action on their own behalf and on behalf of their adversely affected members  
12 and staff.

13           20. Defendant GALE NORTON, United States Secretary of the Interior, is the highest  
14 ranking official within the Department of Interior and, in that capacity, has ultimate responsibility for  
15 the administration and implementation of the ESA with regard to the polar bear, and for compliance  
16 with all other federal laws applicable to the Department of the Interior. She is sued in her official  
17 capacity.

18           21. Defendant UNITED STATES FISH & WILDLIFE SERVICE ("the Service") is a  
19 federal agency within the Department of Interior authorized and required by law to protect and manage  
20 the fish, wildlife and native plant resources of the United States, including enforcing the ESA. The  
21 Service has been delegated authority by the Secretary of Interior to implement the ESA for the polar  
22 bear, including responsibility for making decisions and promulgating regulations, including proposed  
23 and final listing and critical habitat decisions and the processing of petitions for such listings. The  
24 Service has failed to publish a 90-day finding on the Petition to list the polar bear under the ESA.

#### 25 **IV. LEGAL BACKGROUND**

26           22. The ESA is a federal statute enacted to conserve endangered and threatened species and  
27 the ecosystems upon which they depend. 16 U.S.C. § 1531(b). The ESA "is the most comprehensive  
28 legislation for the preservation of endangered species ever enacted by any nation." Tennessee Valley



1 Authority v. Hill, 437 U.S. 153, 180 (1978). The Supreme Court’s review of the ESA’s “language,  
2 history, and structure” convinced the Court “beyond a doubt” that “Congress intended endangered  
3 species to be afforded the highest of priorities.” Id. at 174. As the Court found, “the plain intent of  
4 Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever  
5 the cost.” Id. at 184.

6 23. The ESA protects species listed as either “endangered” or “threatened” by the Secretary.  
7 A species is “endangered” if it “is in danger of extinction throughout all or a significant portion of its  
8 range.” 16 U.S.C. § 1532(6). A species is “threatened” if it is “likely to become an endangered species  
9 within the foreseeable future.” 16 U.S.C. § 1532(20)

10 24. Once a species is listed, an array of statutory protections applies. For example, Section  
11 7 requires all federal agencies to “insure” that their actions neither “jeopardize the continued existence”  
12 of any listed species nor “result in the destruction or adverse modification” of its “critical habitat.” 16  
13 U.S.C. § 1536(a)(2). Section 9 and its regulations further prohibit, among other things, “any person”  
14 from intentionally “taking” listed species or “incidentally” taking listed species without a permit from  
15 the Service. 16 U.S.C. §§ 1538(a)(1)(B), 1539. Other provisions require the FWS to designate “critical  
16 habitat” for listed species, 16 U.S.C. § 1533(a)(3), require the FWS to “develop and implement”  
17 recovery plans for listed species, 16 U.S.C. § 1533(f), authorize the FWS to acquire land for the  
18 protection of listed species, 16 U.S.C. § 1534, and make federal funds available to states to assist in  
19 their efforts to preserve and protect threatened and endangered species, 16 U.S.C. § 1535(d).

20 25. However, none of these protections come into force until a species is officially listed as  
21 threatened or endangered under the ESA.

22 26. In order to ensure the timely protection of species, Congress set forth the listing process  
23 described below. The process includes mandatory, non-discretionary deadlines for the three required  
24 findings that the Secretary must meet, so that species in need of protection do not languish in  
25 administrative purgatory. The three required findings, described below, are the 90-day finding, the 12-  
26 month finding, and the final listing determination.

27 27. Any interested person can begin the listing process by filing a petition to list a species  
28 with the Secretary. 16 U.S.C. § 1533 (b)(3)(A); 50 C.F.R. § 424.14(a).



1           28.     Upon receipt of a petition to list a species, the Secretary has 90 days “to the maximum  
2 extent practicable,” to make a finding as to whether the petition “presents substantial scientific or  
3 commercial information indicating that the petitioned action may be warranted.” 16 U.S.C. § 1533  
4 (b)(3)(A); 50 C.F.R. § 424.14 (b)(1). If the Secretary finds that the petition presents substantial  
5 information indicating that the listing may be warranted, the Secretary then publishes in the Federal  
6 Register a “90 day finding and commencement of status review.” 16 U.S.C. § 1533(b)(3)(A).

7           29.     Upon issuing a positive 90-day finding, the Secretary must then conduct a full review of  
8 the status of the species. 50 C.F.R. 424.14. Upon completion of this status review, and within 12  
9 months from the date that she received the petition, the Secretary must make one of three findings: (1)  
10 the petitioned action is not warranted; (2) the petitioned action is warranted; or (3) the petitioned action  
11 is warranted but presently precluded by other pending proposals for listing species, provided certain  
12 circumstances are present. 16 U.S.C. § 1533(b)(3)(B); 50 C.F.R. § 424.14 (b)(3). This second  
13 determination is known as a “12-month finding.” This deadline is mandatory. There is no mechanism  
14 by which the Secretary can extend the deadline for the finding.

15           30.     Although in almost all cases, Congress intended the Secretary to issue 90-day findings  
16 within ninety days of receiving a petition to list a species, the language “to the maximum extent  
17 practicable” provides the Service with some limited flexibility. However, because the deadline for the  
18 12-month finding is firm, the 90-day finding must be issued in sufficient time that the Secretary can  
19 still comply with the 12-month finding deadline. See Biodiversity Legal Foundation v. Badgley, 309  
20 F.3d 1166, 1176 (9th Cir. 2002) (holding that both 90-day finding and 12-month finding must be made  
21 within one year of receipt of listing petition.)

22           31.     If the Secretary finds in the 12-month finding that the listing of the species is warranted,  
23 then she must publish in the Federal Register a proposed rule, for public comment, to list such species  
24 as endangered or threatened. 16 U.S.C. § 1533(b)(5).

25           32.     Within one year of the publication of a proposed rule to list a species, the ESA requires  
26 the Secretary to render a final determination on the proposal. 16 U.S.C. § 1533(b)(6)(A).

27           33.     At such time, the Secretary must either list the species, withdraw the proposal, or if there  
28 is substantial disagreement about scientific data, delay a final determination for up to six months to

1 solicit more scientific information. 16 U.S.C. §§ 1533(b)(6)(A)(i)(III) & 1533(b)(6)(B)(i).

2 34. Concurrently with a final determination to list a species, the Secretary must render a  
3 final decision concerning the designation of critical habitat for the species to the maximum extent  
4 prudent and determinable. 16 U.S.C. §§ 1533(a)(3) & 1533(b)(6)(C). If the Secretary finds that  
5 designation of critical habitat is prudent, but is not currently determinable, then the Secretary may  
6 extend the deadline to issue a final regulation concerning critical habitat by no more than one additional  
7 year. 16 U.S.C. § 1533(b)(6)(C)(ii).

8 35. It is critical that the Secretary scrupulously follow the ESA's listing procedures and  
9 deadlines if species are to be protected in a timely manner, because the ESA does not protect a species  
10 until the species is formally listed as threatened or endangered.

## 11 **V. FACTUAL BACKGROUND**

12 36. Plaintiffs' Petition to list the polar bear as a threatened species was submitted on  
13 February 16, 2005 and received by the Secretary on February 17, 2005. As summarized very briefly  
14 below, the 154-page Petition details the factors that threaten polar bears with extinction within the  
15 foreseeable future.

16 37. There are twenty polar bear populations distributed throughout the Arctic. These  
17 populations can be found within the jurisdiction of 5 countries: the United States (in Alaska), Canada,  
18 Denmark (in Greenland), Norway, and Russia. Worldwide polar bear abundance was most recently  
19 estimated in 2002 at 21,500-25,000 bears.

20 38. Polar bears are marine mammals and are completely dependent upon Arctic sea-ice for  
21 survival. Polar bears need sea ice as a platform from which to hunt their primary prey species the  
22 ringed seal (*Phoca hispida*), to make seasonal migrations between the sea ice where they feed and their  
23 terrestrial denning areas, and to find mates. Some polar bears even give birth to their cubs in snow  
24 dens on top of the drifting sea ice. Because polar bears hunt only when on the ice, when forced onto  
25 land either by the seasonal retreat of the sea ice in some areas or to give birth to their cubs, polar bears  
26 undergo a time of near complete fasting.

27 39. The earth's climate is warming due to society's production of greenhouse gases,  
28 primarily from the combustion of fossil fuels for energy. The primary greenhouse gases are carbon

1 dioxide, methane, and nitrous oxide. Increasing concentrations of greenhouse gases cause the earth's  
2 atmosphere to retain a greater proportion of the sun's energy, warming the earth's climate much like  
3 the interior of a greenhouse. Climate science has advanced rapidly in recent years, and it has now been  
4 firmly established that society's production of greenhouse gases is responsible for the unprecedented  
5 rate of warming over the past century.

6 40. For a number of reasons, the Arctic has experienced greater and more rapid warming  
7 than temperate regions. Average winter temperatures in some areas of the Arctic have already risen by  
8 7° Fahrenheit. Even using moderate projections of future greenhouse gas emissions levels, average  
9 winter temperatures are projected to rise by 18° Fahrenheit over the Arctic oceans by the end of this  
10 century. As a result of the warming already experienced, Arctic sea ice is melting very rapidly. The  
11 total extent of summer sea ice as measured in September has been diminishing, and the sea ice edge  
12 now occurs hundreds of kilometers further from land than in the past. Summer sea ice may disappear  
13 entirely well before the end of this century.

14 41. Polar bears cannot survive the loss of their habitat. Canada's Western Hudson Bay  
15 population, at the southern edge of the species' range, is already suffering from pronounced reductions  
16 in sea ice. Break-up of the annual ice in Western Hudson Bay is now occurring on average 2.5 weeks  
17 earlier than it did 30 years ago. Earlier ice break-up is resulting in polar bears having less time on the  
18 ice to hunt seals. Polar bears must maximize the time they spend on the ice feeding before they come  
19 ashore, as they must live off built-up fat reserves for up to 8 months before ice conditions allow a  
20 return to hunting on the ice. As a result of the reduced hunting season scientists have observed that the  
21 polar bears in the Western Hudson Bay population are thinner, that female bears have a lower  
22 reproductive rate, and a reduction of survival among juvenile bears. The population of polar bears in  
23 Western Hudson Bay has declined approximately 14%, from 1,100 bears in 1995 to 950 bears in 2004.

24 42. As trends in the Western Hudson demonstrate, polar bear populations may be in danger  
25 even without the complete disappearance of sea ice. The timing of ice formation and break-up  
26 determines how long and how efficiently polar bears can hunt seals. A reduction in the hunting season  
27 caused by delayed ice formation and earlier break-up means reduced fat stores, reduced body condition,  
28 and therefore reduced survival and reproduction.

1           43.     Reductions in sea ice will, in some areas, also result in increased distances between the  
2 ice edge and land. This will make it more difficult for female bears that den on land to reach their  
3 preferred denning areas. Bears will face the energetic trade-off of either leaving the sea ice earlier  
4 when it is closer to land or traveling further to reach denning areas. In either case, the result is reduced  
5 fat stores and likely reduced survival and reproduction.

6           44.     Reduced sea-ice extent will also likely result in reductions in the availability of ice-  
7 dependent prey such as ringed seals, as prey numbers decrease or are concentrated on ice too far from  
8 land for polar bears to reach.

9           45.     Global warming will likely increase the rates of human/bear interactions, as greater  
10 portions of the Arctic become more accessible to people and as polar bears are forced to spend more  
11 time on land waiting for ice formation. Increased human/bear interactions will almost certainly lead to  
12 increased polar bear mortality.

13           46.     The International Union for the Conservation of Nature Species Survival Commission  
14 (“IUCN/SSC”) Polar Bear Specialist Group (“PBSG”) is the world’s preeminent scientific body for the  
15 study, conservation, and management of polar bears and responsible for assigning the polar bear’s  
16 status on the official “Red List” of the world’s species at risk. In June, 2005, the PBSG classified the  
17 polar bear as “Vulnerable” due to the impacts of global warming. A “Vulnerable” species faces a “high  
18 risk of extinction in the wild.”

19           47.     Polar bears are threatened by other factors as well, including high levels of  
20 organochloride pollution (such as PCBs), mercury, and other toxins in the Arctic that bioconcentrate  
21 and bioaccumulate in polar bear tissue. Polar bears are threatened by the proliferation of oil and gas  
22 development in their habitat, which can disrupt denning, feeding, and other behaviors, and which also  
23 poses a risk of harmful oil spills. Despite past successes in controlling formerly widespread  
24 overhunting, polar bears are hunted at unsustainable harvest levels in some areas of Canada, Russia,  
25 and Greenland. Polar bears will be exposed to increasing human activity, such as shipping, that occurs  
26 as a result of decreasing Arctic sea ice. Many of these threats will interact with global warming in  
27 cumulative and synergistic threats ways, further heightening the threat to polar bears.

28           48.     Section 4(b)(3) of the ESA and its implementing regulations required the Secretary to

1 respond to the Petition setting forth the threats to polar bears by making an initial determination within  
 2 ninety days of receiving the petition “to the maximum extent practicable.” 16 U.S.C § 1533 (b)(3)(A).

3 49. The only response Plaintiffs have received from Defendants thus far is a letter dated July  
 4 1, 2005, from the Service stating that it would “not be able to address your petition at this time” due to  
 5 alleged financial constraints. The letter states that the ability to respond to the Petition would be re-  
 6 evaluated as “funds become available, and at the beginning of each fiscal year,” and that petitioners  
 7 would be notified when funds are available to review petitions. Plaintiffs have received no further  
 8 communication from Defendants.

9 50. Ninety days from the date that the Secretary acknowledges receiving the listing Petition  
 10 was May 18, 2005. One year from the date that the Secretary received the Petition will be February 17,  
 11 2006. The Secretary’s failure to issue the 90-day finding has made it impossible for the Secretary to  
 12 meet the deadline for the 12-month finding, as well.

### 13 **VI. CLAIM FOR RELIEF**

#### 14 **(Violation of Endangered Species Act, 16 U.S.C. § 1533(b)(3), for Failure to Make a 90-day** 15 **Finding on the Listing Petition)**

16 51. Plaintiffs reallege and incorporate by reference all the allegations set forth in this  
 17 Complaint, as though fully set forth below.

18 52. The Secretary’s failure to make a 90-day finding on the Petition to list the polar bear as a  
 19 threatened species is a violation of the ESA and its implementing regulations. 16 U.S.C. §  
 20 1533(b)(3)(A); § 1540(g). The Secretary’s failure to perform her mandatory, non-discretionary duty  
 21 also constitutes agency action “unlawfully withheld or unreasonably delayed” within the meaning of  
 22 the APA, 5 U.S.C. § 706(1). Additionally, and/or alternatively, the Secretary’s failure to comply with  
 23 this provision is arbitrary and capricious, an abuse of discretion, not in accordance with law, and a  
 24 failure to observe proper procedure under the Administrative Procedures Act, 5 U.S.C. § 706(2).

### 25 **VII. PRAYER FOR RELIEF**

26 For the reasons stated above, Plaintiffs respectfully requests that the Court grant the following  
 27 relief.

- 28 1. Declare that the Secretary is in violation of her non-discretionary duties under 16 U.S.C.

1 § 1533(b)(3)(A) of the ESA for failing to make a 90-day finding in response to the Petition to  
2 list the polar bear under the ESA;

3 2. Issue permanent injunctive relief compelling the Secretary to make and publish in the  
4 Federal Register a 90-day finding on the Petition to list the polar bear under the ESA by a date  
5 certain;

6 3. Award Plaintiffs their costs of litigation, including reasonable attorneys fees; and

7 4. Grant Plaintiffs such other relief as the Court deems just and proper.  
8

9 **CERTIFICATION OF INTERESTED ENTITIES OR PERSONS**

10 Pursuant to Civil L.R. 3-16, the undersigned certifies that as of this date, other than the named parties,  
11 there is no such interest to report.  
12

13 DATE: December 14, 2005

Respectfully Submitted,

14 CENTER FOR BIOLOGICAL DIVERSITY and  
15 GREENPEACE, INC.

16 By: Adam Keats

17 Adam F. Keats (CA Bar No. 191157)  
18 Brendan Cummings (CA Bar No. 193952)  
19 Kassia Siegel (CA Bar No. 209497)  
Center for Biological Diversity  
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21 NATURAL RESOURCES DEFENSE COUNCIL

22 By: Andrew Wetzler (by AK)

23 Andrew E. Wetzler (CA Bar No. 202299)  
24 Katherine S. Poole (CA Bar No. 195010)  
25 Natural Resources Defense Council  
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